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Chris Sorenson Forbes and Randy Forbes, individually and as guardians and natural parents of Nicole Lynn Forbes v. St. Mark\'s Hospital, a Utah corporation, Don Van Steeter, M.D., Toshiko Toyota, M.D., and John Does 1 through 20. : Brief of Respondent

Utah Supreme Court

Carman E. Kipp, Gregory J. Sanders; Kipp and Christian; P. Keith Nelson; Richards, Brandt, Miller and Nelson; Stewart M. Hanson, Francis J. Carney; Suitter, Axland, Armstrong and Hanson; attorneys for respondents.
Bryan L. McDougal; attorney for appellants.

IN THE SUPREME COURT OF THE STATE OF UTAH

CHRIS SORENSON FORBES and **RANDY FORBES**, individually and as guardians and natural parents of **NICOLE LYNN FORBES**, Plaintiffs-Appellants, -vs- **ST. MARK'S HOSPITAL**, a Utah corporation, **DON VAN STEETER, M. D., TOSHIKO TOYOTA, M. D.**, and **JOHN DOES** 1 through 20, Defendants-Respondents.	Case No. 20713

BRIEF OF RESPONDENTS DON VAN STEETER, M. D. AND TOSHIKO TOYOTA, M. D.

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, THE HONORABLE DEAN E. CONDER, DISTRICT JUDGE

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ISSUES FOR REVIEW

This appeal concerns two sections of the Utah Health Care Malpractice Act: § 78-14-4, which provides a two-year statute of limitations and a four-year statute of repose in medical

malpractice actions, and § 78-14-8, which requires at least 90 days prior written notice of intent before any medical malpractice suit may be filed.[1/]

Section 78-14-8 also provides that the limitations or repose period will be extended by 120 days from the date of the service of the notice of intent if the notice is served less than 90 days before the expiration of the "applicable" time period.

The issue is whether a notice of intent served less than 90 days before the expiration of the limitations period, but not less than 90 days before the expiration of the repose period, extends both periods, as plaintiffs contend, or extends only the limitations period, as the lower court held.

1/ § 78-14-4 is both a statute of limitations and a statute of repose. The two-year period is a statute of limitations since it procedurally limits the time in which a suit may be brought but does not determine the substantive right to bring the suit in the first place. The four-year period is a statute of repose since it cuts off any right of action after the passage of a certain period of time, in essence a substantive determination of the right to bring the action. Turner, The Counter-Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability, 46 J. Air L. & Com. 449, 476 (1981); cited in Maxine Wheaton v. Joseph E. Jack, M. D., Civ. No. C-82-0039W, slip op. (D. Utah, August 9, 1982) (Memorandum Decision upholding the constitutionality of § 78-14-4).

DETERMINATIVE PROVISIONS

These are the relevant portions of the two statutes:

78-14-4. Statute of Limitations-Exceptions-Application.

> No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence. . . .

78-14-8. Notice of Intent to Commence Action.

> No malpractice action against a health care provider may be initiated unless and until the plaintiff gives the prospective defendant or his executor or successor, at least ninety days' prior notice of intent to commence an action. . . . If the notice is served less than ninety days prior to the expiration of the applicable time period, the time for commencing the malpractice action against the health care provider shall be extended to 120 days from the date of service of notice.

STATEMENT OF THE CASE

These defendants find plaintiffs' Statement of the Case to be substantially accurate and, in accordance with Rule 24(b), Utah Rules of Appellate Procedure, accept it for purposes of this Brief.

SUMMARY OF ARGUMENT

The statute of limitations and the statute of repose are distinct time constraints, each serving a different purpose, each of which must be met. Satisfying the limitations period does not excuse satisfaction of the repose period. Nor does the extension of the limitations period necessarily extend the repose period. Section 78-14-8 grants a 120-day extension from the date of the service of a notice of intent only when that notice of intent is served less than 90 days before the "applicable" time period expires. While the limitations period in this case was "applicable," that is, in need of extension, and was so extended, the repose period was not "applicable," not needing extension, and hence, was not extended. This action is, therefore, barred by the statute of repose.

ARGUMENT

This action is barred by the statute of repose unless the repose period was extended by the notice of intent. That notice was served less than 90 days before the expiration of the limitations period, but not within 90 days of the expiration of the repose period. The only issue is whether the 120-day extension of the limitations period also extended the repose period. If it did, this action was timely commenced and the lower court should

be reversed. If it did not, this action is barred and the lower court should be affirmed.

I.

Several dates are relevant here. The alleged malpractice occurred on March 1, 1981. The "injury," as defined in Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979), was discovered by plaintiffs on November 27, 1982. The notice of intent was served on November 20, 1984, and this action was filed on March 12, 1985.

The limitations period, absent any extension, would have expired on November 27, 1984 -- two years after the date of discovery. The repose period, absent any extension, would have expired on March 1, 1985 -- four years after the date of the alleged malpractice.

The notice of intent was served 7 days before the expiration of the limitations period and 101 days before the expiration of the repose period. It created a 90-day "waiting period" from November 20, 1984 to February 18, 1985, during which an action could not be filed. The notice of intent also served to extend the limitations period by 120 days from the date of service, that is, until March 19, 1985. Between February 19, the end of the "waiting period," and March 1, 1985, there was a 12-day grace period in which plaintiffs could have filed this

action and met both the unextended repose period, which expired March 1, and the extended limitations period, which expired March 19.

II.

The limitations period and the repose period represent a legislative compromise between the desire to provide a reasonable period of time for an injured person to commence a malpractice action and the desire to limit that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated. See, § 78-14-2; Allen v. Intermountain Health Care, Inc., 635 P.2d 30, 32 (Utah 1981); Hargett v. Limberg, 598 F. Supp. 152, 157 (D. Utah 1984). The limitations period expresses the first legislative desire, the repose period the second.

A plaintiff must, of course, meet both statutory time periods. One who discovers his injury five years after the date of the malpractice and then files an action is barred by the statute of repose, even though he is within the statute of limitations. Conversely, one who files an action three years after discovery of his injury, but within four years of the date of the malpractice, is barred by the statute of limitations, although within the statute of repose. Meeting one of the statutory time periods

does not relieve a plaintiff of the obligation of meeting the other.

These plaintiffs contend that extending both time periods is unnecessary. They argue that since they extended, and met, the limitations period, they necessarily extended, and met, the repose period. That argument is no more persuasive than the argument that meeting one statutory period meets the other.

Section 78-14-8 provides that "if the notice is served less than ninety days prior to the expiration of the applicable time period, the time for commencing the malpractice action . . . shall be extended to 120 days from the date of the service of notice." The word "applicable" is key.

Plaintiffs contend that the "applicable" time period is the first time period to expire. The lower court held that the "applicable" time period was the period which needed to be extended; that is, the time period which would otherwise expire during the 90-day waiting period after service of the notice of intent. In this case, the limitations period was in need of extension because plaintiffs could not commence their action until the expiration of the waiting period on February 18, 1985. The limitations period which, unless extended, would have expired on November 27, 1984, was extended by § 78-14-8 for 120 days, until March 19,

1985. But that extension had no effect on the expiration of the repose period.

The repose period never needed to be extended and, hence, was never the "applicable" period. Plaintiffs could have filed this action at any time between the expiration of the waiting period on February 18, 1985, and the expiration of the repose period on March 1, 1985, and would have met both the limitations and the repose period.

Nothing obligated plaintiffs to use the full 120-day period given to them in connection with the extension of the limitations period. That 120-day period was merely permissive and did not prevent them from filing at any time after the 90-day waiting period expired without using the entire 120 days.

Plaintiffs contend that the lower court's decision could lead to a dilemma from which there is no relief. However, plaintiffs themselves never faced this dilemma. In their hypothetical, a prospective plaintiff served a notice of intent 90 days before the repose period expired and 89 days before the limitations period expired. In that situation, the prospective plaintiff could never timely commence an action, because the waiting period had not expired yet the repose period had. From this, plaintiffs conclude that the lower court's interpretation of § 78-14-8 is "nonsensical." [Appellant's Brief at 10].

What is nonsensical is that any plaintiff would serve a notice of intent on the assumed date, since if that plaintiff waited but one day, or served it but one day earlier, the problem would not exist. For example, a notice served on October 5 would give an additional 120 days as to both the limitations and the repose periods, since it would have been filed within 90 days of the expiration date of each. Alternatively, a notice served on October 3 would give plaintiff a one-day window in which to file. Plaintiffs' hypothetical presumes a self-inflicted dilemma which common sense could have avoided, rather than an unavoidable situation created by the statutes.

Plaintiffs had two years and 101 days to commence their action after discovering the alleged negligence. They could have filed at any time between February 19 and March 1, 1985, and met both the statute of limitations and the statute of repose. They did not do so, not because of circumstances beyond their control, but because they chose not to do so.

CONCLUSION

In conclusion, defendants Van Steeter and Toyota respectfully submit that the decision of the lower court granting summary judgment in their favor should be affirmed.

DATED this 5th day of November, 1985.

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CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing **Brief of Respondents Don Van Steeter, M. D. and Toshiko Toyota, M. D.** were served this 5th day of November, 1985, by depositing them in the U. S. mail, postage prepaid, to:

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